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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF MINNESOTA,

Petitioner,

vs.

MARSHALL DONALD MURPHY,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MINNESOTA

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., AND THE MINNESOTA CHIEFS OF POLICE ASSOCIATION IN SUPPORT OF PETITIONER

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This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Hon. Thomas J. Johnson, County Attorney, and Robert H. Lynn, Assistant County Attorney, Hennepin County, Minneapolis, Minnesota, Counsel for Petitioner, hereinafter called "State", and Mark S. Wernick, Attorney-at-Law, Minneapolis, Minnesota, Counsel for Respondent, hereinafter called "defendant". Letters of Consent of both parties have been filed with the Clerk of this Court.

INTEREST OF AMICI

AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operations of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* forty-eight times in the Supreme Court of the United States, and thirty-three times in other appellate courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in 75 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

THE MINNESOTA CHIEFS OF POLICE ASSOCIATION, is a not-for-profit Minnesota association and consists of over 300 members who are Minnesota police chiefs and senior law enforcement executives. It seeks to represent in our courts the concern of police administrators with the problems of crime and police effectiveness in dealing with crime, with special emphasis upon the problems and concerns of police officers who face numerous legal and practical problems on a day-by-day basis in their efforts to protect public safety.

Amici's interest in the instant case arises from the compelling constitutional and policy questions pertaining to the routine functions of probation officers as they relate to the duties and responsibilities of other criminal justice and govern-

mental officials who are affected by the decision and opinion of the court below reported as *State* v. *Murphy*, 324 N. W. 2d 340 (Minn. 1982). The Supreme Court of Minnesota held that a probationer (the defendant) who was required to meet with his probation officer and to answer her questions, should have been warned of his Fifth Amendment privilege prior to the beginning of her questioning regarding a matter of an incriminating nature, and that the failure to give such warning barred the admission of the probationer's answers at a subsequent criminal trial, even though he was not in custody within the purview of *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

Amici believe that the ruling of the court below is a wholly unwarranted extention of the principles embodied in the Fifth Amendment. The ruling is also an example of the confusion and uncertainty that exist in the law of interrogation as a result of this Court's decision in *Miranda*.

ARGUMENT

THIS COURT SHOULD CLEAR AWAY THE INCOMPREHENSIBLE DISTINCTIONS AND CONFUSION EXISTING IN THE RULES FOR ROUTINE QUESTIONING BY CRIMINAL JUSTICE AND OTHER GOVERNMENT OFFICIALS AND ADOPT A RULE FOUNDED UPON THE ORIGINAL PURPOSE AND INTENT OF THE FIFTH AMENDMENT THAT CAN BE UNDERSTOOD AND APPLIED BY ALL SUCH OFFICIALS.

Americans for Effective Law Enforcement, Inc. has been privileged to file, as noted, many *amicus curiae* briefs with this Court. In several of them, as in the present one, it has been joined by the **International Association of Chiefs of Police, Inc.**, and other national and state law enforcement groups. Those briefs always presented an analysis of the relevant case law and offered suggestions to the Court for decisions that would aid rather than unduly hinder effective law enforcement, while at the same time not impinge upon basic constitutional protections. In the present brief, for reasons that follow, we are dispensing with an extended analysis of the case law, although we fully agree with the legal analysis submitted by the State in this case. We confine our brief basically to a suggested resolution of the perennial dilemma caused by the intolerable confusion that confronts law enforcement and other officials as they must determine when warnings of Fifth and Sixth Amendment rights must be given before routine questioning of persons they come in contact with in the performance of their duties.

We start with the holding of the Minnesota Supreme Court:

> Because of the compulsory nature of the meeting, because defendant was under court order to respond truthfully to his [probation officer's] questions, and because the [probation officer] had substantial reason to believe that defendant's answers were likely to be incriminating we

> conclude that, as a matter of federal constitutional law, any failure on defendant's part to claim the [Fifth Amendment] privilege [against compelled self-incrimination] when he was questioned does not bar his later reliance on the privilege in seeking suppression of his confession. Stated differently, we conclude that as a matter of due process, the [probation officer] should have warned defendant of his privilege against self-incrimination before she questioned him and that her failure to do so, when she had already decided to report his answers to the police, bars use of defendant's confession at his trial.

324 N. W. 2d at 344.

We note initially that the court did not expressly find that the defendant was in custody for purposes of *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Thus, the warning ritual required by that case was apparently not necessary here, and the court below could have found that in the absence of *Miranda*-type custody no such warnings were required. The majority of the courts that have considered this issue have ruled that non-custodial statements made by a probationer or parolee to his probation or parole officer may be used in subsequent proceedings even though *Miranda*-style warnings were not administered by the officer. *See, e.g., United States* v. *Miller*, 643 F. 2d 713 (10th Cir. 1978); *United States* v. *Holmes*, 594 F. 2d 1167 (8th Cir. 1979); *People* v. *W.*, 24 N. Y. 2d 732, 249 N. E. 2d 882 (1969); *State* v. *Johnson*, 87 S. D. 43, 202 N. W. 2d 132 (1972); *People* v. *Alston*, 79 Misc. 2d 586, 360 N. Y. S. 2d 768 (1974); *State* v. *Roberts*, 14 Wash. App. 727, 544 P. 2d 754 (1976); *People* v. *Parker*, 100 Misc. 2d 800, 421 N. Y. S. 2d 561 (1979).

The court below appears to have based its warning requirement upon the Due Process Clause of the Fifth Amendment rather than facially upon this Court's Fifth and Sixth Amendment warnings requirement as established in *Miranda*. It does, nevertheless, establish a new warning requirement for probation officers—and possibly other government officials—and may be fairly construed to import at least one-half of the standard *Miranda* warning and waiver requirement founded upon the Fifth Amendment.

Amici contend that the holding of the court below is unwarranted under the Fifth Amendment and cannot be supported on the basis of the Fifth Amendment jurisprudence of this Court. We leave to the State of Minnesota the discussion of the caselaw demonstrating that this is so. We merely point out that this new rule totally misconceives the role of the probation (or parole) officer in our criminal justice system, and jeopardizes the roles of other government officials as well.

Probation and parole officers are not police officers. Their primary goal is not the detection and prosecution of crime. It is the rehabilitation of their clients. Imposition of a warning requirement when questioning their clients in non-custodial settings such as that in the instant case will all but hobble this goal and render their role in the criminal justice system meaningless, turning them into an adjunct of the police and the prosecutor. Although *amici* have frequently supported the interests of police and prosecution in this Court, we are compelled to state that casting the probation or parole officer in this new role will lead to the demise of a useful and beneficial element of the corrections component of our criminal justice system.

Other courts have had no difficulty in recognizing these principles and in fashioning rules that do not require probation officers to be considered as police officers. For example, in *Latta* v. *Fitzharris*, 521 F. 2d 246 (9th Cir. 1975), the court ruled that where a parolee was arrested by his parole officer with a pipe full of marijuana in his hand, a warrantless search of the parolee's home by the parole officer, and police officers accompanying him, was reasonable. Because of the special function and role of the parole officer in our criminal justice system the court declined to apply the Fourth Amendment Exclusionary Rule to his search and held that the admissibility of evidence obtained as a result of such a search was not limited to parole revocation proceedings. The court stated, at 521 F. 2d 250:

> The fact that crimes are detected during the admistration of the parole system does not convert what is essen-

tially a supervisory and regulatory program into a subterfuge for criminal investigations.

The purposes of the parole system give the parole authorities a special and unique interest in invading the privacy of parolees under their supervision. In order to fulfill his dual responsibilities for helping the parolee to reintegrate into society and evaluating his progress, and for preventing possible further anti-social or criminal conduct by the parolee, it is essential that the parole officer have a thorough understanding of the parolee and his environment, including his personal habits, his relationships with other persons, and what he is doing, both at home and outside it. It is equally important that this information be kept up to date. *See* R. Dawson, *supra* at 326, 332-33; Newman, Concepts of Treatment in Probation and Parole Supervision, 25 Fed.Prob. 11 (March 1961); Note, Observations on the Administration of Parole, 79 Yale L.J. 698, 699-700 (1970). Much of this information can be obtained by methods which necessitate little or no invasion of the parolee's privacy, such as interviews with the parolee himself or with his employer, family, or friends and visits to his house. However, these techniques have inherent limitations.

. . . although the conditional nature of the parolee's release does not place him at the unfettered mercy of the parole authorities, he is justifiably subjected to restrictions not applicable to the population as a whole. Many of these restrictions relate to matters which the parolee might otherwise be entitled to preserve as private.

The principal protection against abuse of this authority is the "helping" function of the parole officer's job, and the training that he has received to fit him for that job. A good parole officer does not regard himself as a policeman.

The court concluded that for these reasons ". . . the propriety of warrantless searches by parole officers pursuant to proper conditions affixed to the status of parole cannot be determined by automatic reference to the law of ordinary and administrative searches." 521 F. 2d at 251.

The Minnesota Supreme Court itself had previously recognized the unique role of probation officers and the need to apply different standards to the performance of the probation function. In *State* v. *Earnest,* 293 N. W. 2d 365 (Minn. 1980), the court held that a defendant's Fourth Amendment rights were not violated by a warrantless probable cause search of his residence by his probation officer during a house visit. The Minnesota Court stated, at 293 N. W. 2d 368:

> It has been recognized that the relationship between a probation officer and his probationer is a special one. *Latta* v. *Fitzharris,* 521 F. 2d 246, 249 (9th Cir.), *cert. denied,* 423 U.S. 897, 96 S. Ct. 200, 46 L. Ed. 2d 130 (1975). The efficient functioning of the probation system requires the probation officer to work toward rehabilitation of one convicted of a crime while at the same time, protecting the public interest. *State* v. *Tarrell,* 74 Wis. 2d 647, 652, 247 N. W. 2d 696, 700 (1976). In order to accomplish these ends, the probation officer must have thorough up-to-date knowledge of the probationer's personal habits, relationships, and activities. See *Latta* v. *Fitzharris,* 521 F. 2d at 249. Although we agree that probation searches fall within the ambit of the Fourth Amendment, and must therefore comport with a standard of reasonableness, see *Latta* v. *Fitzharris,* 521 F. 2d at 248—9; *People* v. *Anderson,* 189 Colo. 34, 37, 536 P. 2d 302, 304—05 (1975), **we also recognize that, because of this special relationship between the probation officer and probationer, the law relating to probation searches cannot be strictly governed by automatic reference to ordinary search and seizure law.**

The court added, at p. 369,

> **. . . that putting onerous restrictions on the ability of a probation officer to protect the public interest may actually**

> deter courts from a judicious use of probation in the future in marginal cases. A court's uncertainty as to the ability of a probation officer to supervise his probationers closely may tip the balance when it comes to sentencing.

We ask this Court to recognize the foregoing compelling policy considerations, which are equally applicable in the area of Fifth Amendment protections, and to rule that due process does not require probation officers to give Fifth Amendment warnings in the circumstances involved in the instant case. As Justice Yetka noted in his dissent in the case now before this court, at 324 N.W. 2d 345:

> . . . the privilege against self-incrimination was [not] intended to apply to the situation presented here. The defendant is a parolee who would be serving a prison sentence but for that fact. One of the conditions of his parole is to meet periodically with a probation agent. The probation officer's function is to work towards rehabilitating the parolee while protecting the public interest. *State* v. *Earnest,* 293 N. W. 2d 365 (Minn. 1980). To do this job, the agent must be aware of all of the parolee's problems, both past and present. It is entirely reasonable for the agent to ask a parolee if he has had prior problems with the law. If the agent in this case had gone first to the police before talking with the defendant, she would have destroyed her credibility and severely impaired her ability to assist the defendant.

Amici point out that a contrary ruling will have serious consequences for routine questioning conducted by other criminal justice personnel and other government officials as part of their regular duties. For example, will it be necessary for welfare caseworkers to give Fifth Amendment warnings when questioning welfare recipients concerning eligibility issues? Child welfare caseworkers questioning parents concerning potential child abuse? License examiners questioning applicants? Assessors questioning property owners concerning home improvements? Bank examiners questioning bank employees? Building inspectors questioning property owners about possible code violations? EPA officials questioning plant managers?

Voting judges questioning voters concerning credentials? The list of governmental officials potentially affected by the Court's ruling in the instant case is impressive.

In order to put an end to the intolerable confusion already existing in this area of Fifth Amendment law we ask this Court to adopt a clear rule to the effect that Fifth Amendment warnings are not required whenever probation, parolee, and other non-police governmental officials question persons in the routine, ordinary pursuit of their statutory or customary duties. To the extent that the present confusion results, at least in part, from the Court's decision in *Miranda* v. *United States*, 384 U. S. 436 (1966), we join with the suggestion of the Minnesota Supreme Court in the instant case that there must be a solution in this area of jurisprudence other than the exclusion of trustworthy evidence. 324 N. W. 2d at 344. To the extent that *Miranda* may indeed be the cause of such confusion and overreaction as represented by the decision in the instant case, we call for a fundamental reexamination of the rationale of that 5-4 decision, either in this case or another in the future that squarely presents the issue of the continued viability of that decision. *See*, Inbau, *Over-Reaction—The Mischief of Miranda* v. *Arizona*, 73 J. Crim. L. & C. 797, 809 (1982).

CONCLUSION

Amici respectfully submit that the decision of the Supreme Court of Minnesota should be reversed on the facts and law, and on the basis of sound judicial policy.

Respectfully submitted,

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